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In the Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL POWER COMMISSION, PETITIONER

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND THE CITY OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL POWER COMMISSION

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1. Seeking to minimize the importance of this case, Con Edison claims (Br. in Opp., p. 6) that "anyone familiar with the natural gas industry" would realize that direct purchases in the field by boiler-fuel users will not become widespread. A contrary prediction has been offered by the industry journals, which often enjoy a privileged insight into the plans of gas producers and transporters. Quickly grasping the import of the decision below, they have reported that similar schemes will probably be forthcoming if that decision is allowed to stand. See, *e.g.*, brief *amici curiae* of Southern California and Southern Counties Gas Companies, p. 4, n. 1; cf. R. 63a–71a.

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Con Edison also says that X–20 gas—the gas involved in this case—is uneconomical and costs more than oil or coal, on the basis of an extra-record comparison with 1959 fuel costs (Br. in Opp., p. 6). Con Edison's present altruistic posture stems not from any deliberate choice to buy a costly fuel but rather, it seems, from a fortuitous and possibly temporary decline in oil and coal prices at the Waterside installation. In any event, the record shows that the long-term firm price which it negotiated with the producers offers a significant hedge against future inflation of fuel costs (R. 165a, 98a–100a). And with respect to other potential boiler-fuel users there is no reason either to disbelieve the forecasts of the trade press or to doubt that the prices of competing fuels in many parts of the country will make direct purchase and transportation arrangements attractive. It must be emphasized that the dangers to the consuming public anticipated by the Federal Power Commission are equally acute whether industries in New York City, or in California, or in other parts of the country, siphon off natural gas from any given producing region.

2. If the decision below is permitted to stand, and the Commission is consequently disabled from dealing with a burgeoning non-jurisdictional market, Sections 4 and 7 of the Natural Gas Act will provide only an illusory "quick short answer" to the public's need (see Transco Br. in Opp., p. 15). For when, today, a producer has little choice but to sell for resale in interstate commerce, the Commission may effectively use its price-reviewing powers to keep his rates in

line. Cf. *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 394. But if an alternative becomes freely available in virtually every gas-producing area, we believe that it will prove impossible to limit jurisdictional rates for new gas to the reasonable revenue requirements of the industry in the face of a competing non-jurisdictional traffic which will bear a higher price. Moreover, diversion of even a fraction of the gas produced in a major area, such as the Gulf Coast, may easily disrupt the general consumer supply.

The disabling consequences of the Court of Appeals' decision may become critical because review of denials of certificate applications such as Transco's can repeatedly be sought in that same court. As our petition points out, roughly half of the "natural-gas companies" which are not independent producers are incorporated in states within the Third Circuit (Pet., p. 10, n. 4). Almost every long-distance pipeline company in the country is incorporated in the Third Circuit. And on a volume basis Delaware and Pennsylvania corporations account for roughly 87 per cent. of all gas purchases by interstate pipeline companies directly from producers (computed from data in Federal Power Commission, *Direct Sales By Producers of Natural Gas to Interstate Natural Gas Pipeline Companies*—1958, pp. 40–41). There is hardly a producing field in the country which is not accessible to such Third Circuit companies. Already filed in the court below is one petition for review which attacks another Commission order because end-use was considered, citing the decision below as control-

ling. *Southern California Edison Company* v. *Federal Power Commission*, No. 13178 (C.A. 3). Furthermore, the Third Circuit has recently adhered to its ruling in the instant case. *Lynchburg Gas Company* v. *Federal Power Commission*, C.A. 3, No. 12,953, decided February 24, 1960 (Appendix, *infra*, pp. 8–13, esp. p. 10).

3. Respondents implicitly argue that despite the importance of this case to natural-gas consumers throughout the country the Court should deny our petition so as to rid the Waterside neighborhood of excessive smoke. When respondents speak of the serious national "air pollution" problem they assimilate a host of concerns, such as those stemming from automobile exhaust fumes, to the particular facts of this case. The actual testimony regarding the effluents from Waterside left the Presiding Examiner more than a little dubious (R. 172a–173a). Con Edison's witnesses repeatedly testified that the crux of their addition to New York's smoke problem centered about boilers 71 and 72, whose firing configuration was inadequate (R. 16a, 19a, 23a, 26a–27a, 41a, 80a, 89a, 97a, 115a, 140a) and that 25,000 Mcf a day (or 9,125,000 Mcf a year) of gas would be necessary to permit smokeless operation of those boilers (R. 7a, 36a, 91a, 98a). It seemed strange that Con Edison had not reacted to the smoke nuisance (or hazard) by burning under boilers 71 and 72 gas already available to it through ordinary purchases from Transco, for at least the nine warmer months of the year (R. 91a–92a, 100a–101a, 167a–168a). Con Edison's most recent annual report to the Commission indicates that it has finally taken that step; in 1959, without any X-20

arrangement, it managed to burn 10,437,005 Mcf at Waterside (F.P.C. Form No. 1, p. 86–1). Thus, the particular situation at Waterside today does not support respondents' claim that our petition should be denied in order to alleviate the pollution problem in New York.[1] Moreover, if air pollution generally is a problem of great public importance, this Court's answer to it should not be limited to a negative and fortuitous exercise of the certiorari discretion which would affect one minute area at a time. The Court should review the important problem we present, respecting the Commission's statutory power, so as to determine the extent to which day-by-day consideration of the problems of fuel competition should take such matters into account. The Third Circuit's opinion in this case—particularly when read in the light of its adherence to the decision below in its subsequent *Lynchburg* ruling, *supra* (a case not involving air pollution)—is not confined to the particular problem of air pollution in the Waterside area, or even to air pollution generally, but covers all consideration by the Commission of any factors outside the conventional requirements of ability to serve.

4. Indeed, the respondents' concern with genuine air pollution dangers emphasizes the national impor-

[1] The various changes of circumstances from the record as made two years ago, which are revealed by this memorandum (*supra*) and Con Edison's brief in opposition, demonstrate the inappropriateness of the Court of Appeals' remand to the Commission "with directions to issue the certificate applied for" (271 F. 2d 942, 953). Even the showing made as to the "conventional factors" will no longer suffice, because some of the facilities proposed originally for X–20 service have been authorized for performance of other unrelated services as a result of Transco's subsequent application in F.P.C. Docket No. G–16603.

tance of this case. For the power to weigh possible injury to community health, like the power to weigh the national defense interest in the sale of gas to the Atomic Energy Commission (*National Coal Association* v. *Federal Power Commission*, 89 App. D.C. 135, 140, 191 F. 2d 462, 467), is intimately and inseparably tied to the very power to consider end-use which is here in issue. Since virtually complete and smokeless combustion is an inherent attribute of natural gas, its substitution for other fuels invariably reduces air pollution. Normally it seems reasonable to reserve the limited supply for the smaller consumer on the expectation that a large boiler plant is in a better position to install precipitators and other smoke abatement equipment. If, however, air pollution caused by use of other fuels assumes menacing proportions in a given community, the Commission might well give it certificate preference as against areas where climatic conditions or lower population density produce less aggravated circumstances. Yet the

power to afford such preference is denied by the decision below.

Respectfully submitted.

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April 1960.

APPENDIX

United States Court of Appeals for the Third Circuit

No. 12953

LYNCHBURG GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ATLANTIC SEABOARD CORPORATION, INTERVENOR

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Argued November 6, 1959

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges*

Opinion of the Court

(Filed February 24, 1960)

By McLAUGHLIN, *Circuit Judge.*

Petitioner, Lynchburg Gas Company (Lynchburg) seeks review of an order of the Federal Power Commission (Commission) which denied Lynchburg's request for a supplemental gas supply from Transcontinental Gas Pipe Line Corporation (Transco). Atlantic Seaboard Corporation (Seaboard), which presently supplies all of Lynchburg's gas, intervened to resist the application.

Lynchburg's proposal contemplated the creation of a subsidiary, Lynchburg Pipe Line Company (Pipe-

line), which would purchase gas from Transco and supply it to Mead Corporation (Mead) a large industrial user of coal but who, according to Lynchburg, will convert its boilers to gas upon a sufficient supply being made available. A limitation in Seaboard's tariff restricts the amount of gas available for resale as boiler fuel to 2,000 Mcf per day. Mead's requirement allegedly would be 6,500 Mcf per day. This industrial sale is expected to help make construction of a connecting line from Transco to Pipeline feasible. Lynchburg claims "the overall plan would provide an economical and necessary additional gas supply for the people of Lynchburg by making available to petitioner, during the periods of peak demand, the volumes of gas required in excess of the quantities presently available from Seaboard * * *". At the hearing, Lynchburg was unable to show any firm commitment from Mead to convert to and buy gas from the petitioner.

The Commission's refusal to issue a certificate is based upon three grounds:

> (1) Lynchburg's failure to present a market for the gas to be received from Transco in that it had no evidence of a firm commitment from Mead Company, the source it relied on.
>
> (2) The end use of the gas to be supplied is inferior in that it is to be employed in the firing of boilers for commercial production rather than in the heating of homes.
>
> (3) It is protecting the pioneer certificated supplier in the area, Seaboard, from economic injury.

We find the refusal of the Commission can be sustained on the first ground only. Lynchburg argues that being an old-established, reputable firm the Commission should presume it would not proceed with its project unless and until it was sure it could attach

customers to the proposed facility. In its reply brief the petitioner agrees that the Commission can issue a certificate with a condition, urging that in this instance it could have insisted on a firm commitment with a time limitation. Section 717F(e), 15 U.S.C. conveys power to impose conditions within the discretion of the Commission. *Oklahoma Natural Gas Co.* v. *Federal Power Commission*, 257 F. 2d 634 (D.C. Cir. 1958), cert. dismissed, 358 U.S. 948 (1959). Having power to condition a certificate, it is not unreasonable that the Commission have power to withhold a certificate until the condition is met. This is particularly so where, as here, the demand is not overly burdensome. There is no insistence by the Commission of commitments from a multitude of potential customers but simply from the one industrial user relied on by the petitioner.

If and when Lynchburg obtains authorization from Mead it can immediately begin a new action before the Commission. No long delay should be thus involved since that would be a minor proposition standing alone as compared to the fact that the present proceeding is merely a small part of a large litigation before the Commission.

The Commission's second objection to the issuance of the certificate, that of the end use of the gas to be supplied Lynchburg has been laid to rest by the decision of this court in a companion case to the one here, *Consolidated Edison Company, et al.* v. *F.P.C.*, 271 F. 2d 942 (3 Cir. 1959). In view of that decision there is little if any merit in the Commission's argument that "an additional burden is cast upon Lynchburg by virtue of the fact that its request * * * was essentially for boiler fuel gas."

The third reason for the refusal to issue the certificate is to protect the pioneer certificated supplier.

Seaboard, from economic injury because of loss of base load sales in the Lynchburg market area. Seaboard urges, and the Commission held, that excesses, caused by curtailment of Mead's supply by Pipeline, either completely or partially on certain days during the year, and excesses due to Mead not using the amount expected by Lynchburg, will be sold by Pipeline to Lynchburg for use in the Lynchburg area thereby displacing Seaboard's sales.

Seaboard's policy witness, Mr. Workman, gave estimated monetary losses of Seaboard based on load factor percentages which had Mead using less than the 6,500 Mcf per day which Lynchburg claims it will use. According to the witness this would necessitate Pipeline either cutting back on its purchases from Transco or selling the remaining gas to Lynchburg. His estimation of Seaboard's loss was based on an assumption of Mead using gas at a 65% load factor and again at an 80% load factor and further assuming that Pipeline sold the remaining 35% or 20% to Lynchburg thereby displacing that amount from Seaboard. Quite apparently that testimony, and the exhibits introduced in connection with it, are simply assertions of possibilities and do not support Seaboard's stand. This is further pointed up by the witness's admission that he was completely unfamiliar with the Mead Company and its operations.

All of the above is important in revealing the weakness of Seaboard's stated position. However, the below quoted testimony from Mr. Workman goes further and suggests that Seaboard's major opposition emanates from the fact that due to the absence of a contractual understanding between Lynchburg and Mead, Seaboard has no actual knowledge of what will develop should Lynchburg be awarded the desired gas:

Q. Mr. Workman, would you summarize the factual or economic reasons why Atlantic Seaboard Corporation is convinced that the attempt of Lynchburg Pipe Line Company to secure gas from Transcontinental for resale to Lynchburg Gas Company will adversely affect Atlantic Seaboard Corporation.

A. It is our belief that Atlantic Seaboard Corporation could have a substantial portion of its present and future market taken away from it by Lynchburg Pipe Line Company, and indirectly by Transcontinental. *This is based upon the fact that there is no contractual commitment on the part of Mead Corporation* to buy any or a fraction of the proposed 6,500 Mcf per day, which Lynchburg Pipe Line Company is seeking from Transcontinental. In the event that the Mead Corporation should enter into some sort of a contract with Lynchburg Pipe Line Company, any of the major elements of that contract which would indicate a daily quantity below 6,500 Mcf, a contract term less than 20 years, a minimum bill less than that required for an extremely high load factor, and the likes, would be a direct threat that Lynchburg Pipe Line Company would have to sell to its affiliate, Lynchburg Gas Company, in order to protect the financial integrity of the two companies.

The necessary effect would be that Atlantic Seaboard Corporation would be substantially hurt by the loss of any portion of its market. [Emphasis supplied.]

This emphasizes once more that most of Lynchburg's difficulty stems from its failure to have some substantial arrangement with Mead. Presumably Lynchburg will initiate new proceedings if it is successful in procuring such agreement. The latter, if secured, should eliminate or at least greatly reduce speculation regarding injury to Seaboard. As of now any alleged injury is ephemeral.

The Commission's order will be affirmed solely because of the failure of Lynchburg to produce evidence of any binding arrangement with its named purchaser of the natural gas supply it seeks.

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